

explaining:

If the term 'temporary' has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*.³⁴

The crucial words for the court in distinguishing between permanent and temporary occupations seem to be "transient" and "inconsequential." Even were wishful thinking to be rewarded, and analog spectrum returned in 2006, mandatory carriage of digital signals during the transition period would clearly be considered permanent.

24. Thus, a mandatory requirement for carriage of digital broadcast signals during the transition period would constitute a physical, permanent taking, a *per se* taking in violation of the Fifth Amendment.

25. Even if the Loretto decision did not exist, under the traditional ad hoc balancing test a requirement that cable channels be devoted to the carriage of local digital signals during the transition period would be considered a taking, nonetheless. An ad hoc, case by case balancing approach is generally applied to substantial government regulation of an owner's use of property to determine whether the regulation goes "too far" and thus constitutes a taking under the Fifth

³⁴ Hendler, 952 F.2d at 1377.

Amendment.³⁵ Courts will weigh the following factors: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the character of the governmental action.³⁶

26. Unlike the lower court finding in Loretto, where it was determined essentially that the impact of having 30 feet of coaxial cable on a roof was *de minimis*, cable systems will suffer real and measurable harm if the Commission imposes digital “must carry” requirements during the transition period. System revenues are based largely on the number of subscribers. Subscribers are attracted to cable service because of the multiplicity of channels and variety of program services offered. If systems are required to carry analog and digital channels simultaneously, channels that would otherwise be programmed in the best judgment of the cable operator to maximize revenue, will be lost and, indeed will be viewable only by the elite few who have purchased expensive DTV receivers. In many cases systems will have to remove channels to which subscribers have become accustomed in order to make room for digital channels. Subscriber dissatisfaction can be translated into lower revenues.

27. Digital “must carry” rules also would interfere with distinct, investment-backed expectations of cable operators. Although pre-1992 investors might have expected that Congress would enact “must carry” legislation, no one could

³⁵ Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

³⁶ Penn Central, 438 U.S. at 124.

reasonably have expected the Commission to interpret the Act to require simultaneous carriage of analog and digital channels, thus doubling the number of broadcast stations that must be carried. Clearly, the value of cable systems will be reduced if significant numbers of channels are lost to digital carriage, and such an eventuality could not have been envisioned.

28. Finally, an examination of the character of governmental action would reveal not some minor infringement of a cable operators's property rights, but an outright commandeering of property itself. In Penn Central, the Court explained, "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government..., than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."³⁷ Government is permitted all manner of meddling with the economic value of property without its actions constituting a "taking." But when government makes a naked grab for the property itself, a court will find that a taking has occurred. Such would be the case if the Commission required the carriage of digital signals.

29. Thus, even under the ad hoc balancing test, a digital "must carry" rule would be on extremely rocky Constitutional grounds. The rule would constitute a taking of property, not mere interference, and it would cause economic harm to cable operators. In light of the Loretto decision, however, the balancing test is

³⁷ Penn Central, 438 U.S. at 124.

unnecessary. Digital must carry rules would create a clear *per se* taking.

30. Although the standard constitutional redress for a governmental taking of private property would be just compensation for that taking, we need not discuss that issue in this case. Instead, CATA submits that, absent specific authority from Congress – which as we have argued above, the Commission does not have – the Commission is prohibited from promulgating rules that would require cable systems to carry both the analog and digital signals of broadcasters, because to do so would subject the government to claims for compensation under the Tucker Act.³⁸ The Commission would be in the position of encroaching upon the Congressional prerogative to raise revenue and appropriate funds. Such a must carry regulation would be invalid under Bell Atlantic Telephone Companies v. FCC.³⁹

31. In Bell Atlantic, the FCC orders at issue required Local Exchange Carriers (“LECs”) to permit Competitive Access Providers (“CAPs”) to connect their facilities to LEC networks through physical co-location. The LECs argued that the FCC lacked statutory authority for the orders. The court determined that although, in most circumstances, it would defer to an administrative agency’s statutory interpretations, “[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional

³⁸ The Tucker Act, 28 U.S.C. § 1491(a)(1).

³⁹ See Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

questions.”⁴⁰ The court reminded that an administrative agency cannot so interpret a statute to create a “class of cases in which the application of a statute will necessarily constitute a taking.”⁴¹ The Court reasoned that since the Tucker Act requires the federal government to compensate such takings,⁴² the creation of such a class of cases would encroach upon Congress’s exclusive powers to raise revenue and to appropriate funds.⁴³ The Court vacated the FCC’s orders requiring physical co-location.

32. Digital must carry rules would share a similar fate. If the Commission interprets Section 614(b)(4)(B) of the Communications Act to require cable systems to carry broadcasters’ analog *and* digital channels, it would create an identifiable class of cable systems⁴⁴ that would be entitled to line up in front of the Court of Claims to obtain just compensation for the taking of their property. This the Commission cannot do without specific legislative authority which it does not have.

⁴⁰ Bell Atlantic, 24 F.3d at 1445.

⁴¹ Id., (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 n.5 (1985)). The court applied Loretto and found that if the Act permitted the FCC to order a physical occupation of LEC property, the exercise of that statutory power constituted a per se taking. Id. at 1446.

⁴² The Tucker Act, 28 U.S.C. § 1491(a)(1) vests exclusive jurisdiction over takings claims that exceed \$10,000 in controversy, as this one clearly does, in the U.S. Claims Court. See 28 U.S.C. § 1346(a)(2)(granting district courts concurrent jurisdiction for taking claims not exceeding \$10,000 in amount).

⁴³ Bell Atlantic, 24 F.3d at 1445.

⁴⁴ TELEVISION & CABLE FACTBOOK, Vol. 66, 1998, I-104.

TIME AND TECHNOLOGY HAVE PROVED THE COMMISSION'S
INITIAL FINDINGS THAT "INPUT SELECTORS" ARE AN
ADEQUATE SUBSTITUTE FOR MUST CARRY

33. Digital broadcast television, by definition, is intended to be received over-the-air, by means of an antenna. Studies by the Advisory Committee on Advanced Television Service and the Commission staff have assured that the coverage area of DTV channels will approximate as closely as possible their NTSC analogs.⁴⁵ The complex allotment table for DTV channels was designed with specifications for effective radiated power and tower heights to enable over-the-air reception. Nevertheless, there seems to remain a concern that cable subscribers whose systems might not carry a DTV channel for some period of time will not otherwise have access to the new technology.

34. This concern is not a matter for regulation. As the Commission observes, "a switch mechanism is now incorporated into many television receivers (as well as into videotape recorders and DBS receivers) and new digital television receivers may have multiple input possibilities fully selectable from remote control devices."⁴⁶ This is indeed the case. What was once the "A/B" switch has evolved into an input selector integrated into receivers. Cable subscribers in the future, like DBS subscribers now, will merely have to press a button to switch

⁴⁵ In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, Sixth Report and Order, released April 21, 1997.

⁴⁶ Notice at para. 88.

their signal source. Significantly, such a scheme has been found by the Commission to be not only an adequate method of obtaining signals not carried on a cable system, but a method that increases program diversity for the benefit of cable subscribers.

35. Even before input selector switches had migrated from the back of converter boxes to the printed circuitry of receivers, the Commission had the opportunity to thoroughly evaluate their ability to solve the “must carry” issues of an earlier time. In 1986, in response to the decision in Quincy Cable Inc. v. FCC,⁴⁷ the Commission adopted a program to eliminate the need for must carry rules.⁴⁸ An integral part of that program involved a requirement that cable systems offer subscribers input selector switches. Although technology has now rendered such a requirement unnecessary, the Commission’s willingness to rely on input selector switches is instructive. The Commission stated:

We find that rules enhancing the availability of input selector switches to viewers and the dissemination of information concerning their need and purpose will help attain the important governmental interest of maximizing the program choices available to the public. In this regard, the maximization of cable subscribers’ program choices is furthered by ensuring the opportunity to receive all off-the-air broadcast signals as well as cable offerings. *Indeed, their choices are then increased if not all off-the-air signals are duplicated on cable, but, rather, cable channels are freed up to other programming that viewers are unable to receive off-the-*

⁴⁷ Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

⁴⁸ In the Matter of Amendment of Part 76 of the Commission’s Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, MM Docket No. 85-349, Report and Order, 1 FCC Rcd. 864, released November 28, 1986 (hereinafter 1986 Report and Order).

*air.*⁴⁹ (Emphasis added)

The Commission even addressed the argument made by some now that cable systems represent a “bottleneck” limiting the viewing of local signals, and went on to defend its program on the basis that it maximized cable operators’ First Amendment rights.

In this respect, our previous concerns that input selector switches would be inconvenient and, therefore, not used by consumers, no longer appear valid in the context of the search for acceptable solutions that are *minimally intrusive on cable operators’ editorial discretion* in the post-Quincy environment. We are convinced that once cable subscribers become accustomed to using off-the-air reception on an equal basis with cable service, then cable systems no longer *will have an artificial ability to limit their subscribers’ access to over the air broadcast signals.*⁵⁰ (Emphasis added)

The Commission noted that outdoor antennas are inexpensive and easy to install and even brushed aside arguments that many places did not permit antennas.⁵¹

36. In short, then, the Commission found that input selectors worked, that they not only provided an effective means for cable subscribers to view broadcast signals but actually benefitted subscribers, and that there were few impediments to their use.

⁴⁹ *Id.* at para. 161.

⁵⁰ *Id.* at para. 163.

⁵¹ *Id.* at para. 166. Now, of course, restrictions on antennas are no longer an issue. They are prohibited by law and regulation.

37. Every one of the Commission findings applies to the current consideration of how cable subscribers may have access to DTV channels during the transition from analog to digital broadcasting.⁵² If there has been any change at all, it is that input selector switches are even more reliable, are now integrated into receivers, and can be accessed from the comfort of a sofa. Moreover, the Commission's work to create a ubiquitous, robust DTV allocations scheme assures that input selector devices will access crystal clear digital broadcast signals from a home antenna.

38. The Commission could easily determine that it need not explore DTV "must carry" options further and retire from the field, simply voicing the legal maxim, "*Ibi fui id feci*."⁵³

CONCLUSION: NOW IS NOT THE TIME

39. No one knows whether the public will embrace digital broadcasting, be it delivered in High Definition or SDTV mode, or on what scale. It may be that television pictures, particularly digital signals supplied by cable systems and DSS systems, are so good that the public may not be willing to pay more for what may

⁵² None of these findings have ever been refuted, although the Congress in 1992 chose not to give them weight. The Supreme Court in Turner II simply found that the Congress had sufficient evidence to exercise its political discretion. Time and technology have now confirmed the Commission's original conclusions and today millions of Americans daily exercise their input options without even realizing it.

⁵³ Been there, done that.

be perceived as only an incremental improvement. It may also be the case that HDTV's proper role will be to serve large flat screens, which, of course, are still, for the most part, experimental, and the public will eschew the present refrigerator-sized traditional DTV receivers in favor of a screen that can be hung on a wall. Many broadcasters do not know exactly what they are going to do with the new broadcast channels, let alone how a business plan will be developed to actually support them. It is nothing but "empty rhetoric" for the Commission or anyone else to pronounce the significance or importance of this new form of television before there is any factual support for the proposition that it will succeed. As soon as Congress tied the switch-over from analog to digital transmission to the number of sets actually bought, success became something that must be measured. By law, the Commission's grand scheme to establish digital transmission as the transmission standard has been relegated to the public for its decision. When 85 percent of the public can see it, then DTV can be considered a success. We hope it will be successful. The licensees certainly hope it will be successful, and the government, which has a vested interest in reclaiming the analog frequencies for future auction surely would like to see this new medium be successful. But there are no facts presently available to tell us one way or another whether it will or not -- only unsubstantiated rhetoric.

40. Such rhetoric is not sufficient ground upon which to fashion a new regulatory structure. The fundamental position of the Cable Telecommunications Association is to respectfully request that the Commission simply keep this

docket open as an inquiry for future factual input as the evolution toward digital broadcasting progresses. It is only after some factual foundation can be built, based on experience and time, that the Commission can expect to receive substantive answers to many of the questions it has posed in this proceeding. Without those factually based answers the Commission has no reasonable (and consequently no legal) basis upon which to build a new regulatory "must carry" edifice.

41. By not acting precipitously, the Commission will permit market forces to determine acceptance of DTV. As the cable industry has said many times, if DTV becomes popular, if customers want it, then surely cable systems will supply it.⁵⁴


⁵⁴ When the Commission adopted rules permitting stereo broadcasting for television stations, it said that it would look at various issues: "MTS receiver penetration projections, consumer demand for MTS, costs associated with retransmission of MTS, the technical problems that arise in cable carriage of MTS, and the need for mandatory carriage obligations in order to assure that these services will be retransmitted on cable systems." In 1985, the Commission determined that the record did not warrant mandatory carriage. See In the Matter of the use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters. Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize Transmission of Teletext by TV Stations Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV stations, Docket No. 21323, Docket No. 81-741, MM Docket No. 84-168, Memorandum Opinion and Order, 100 FCC 2d 111, released February, 8, 1985. Significantly, within a few years stereo programming was retransmitted by cable- systems without a regulatory requirement.

As the Commission will learn from the comments in this proceeding, even before the Commission's final DTV decisions in 1997, many local broadcast stations and cable systems had bargained under the terms of the retransmission consent election for cable carriage of a DTV channel when it became available. It is likely that if the Commission simply waits, most cable households will have access to DTV broadcasting. But it will have occurred without mandate and without transgressing on the constitutional rights of cable television operators.

42. For the reasons stated herein, CATA urges the Commission not to entertain requirements for the mandatory carriage of DTV channels by cable television systems during the transition from analog to digital broadcasting.

Respectfully submitted,

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